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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/505,735	02/16/2000	Alessandro Muti	MFCP.68276	6053

7590 08/08/2003

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EXAMINER	
AVELLINO, JOSEPH E	
ART UNIT	PAPER NUMBER
2143	

DATE MAILED: 08/08/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action	Application No. 09/505,735	Applicant(s) MUTI ET AL.	
	Examiner Joseph E. Avellino	Art Unit 2143	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 29 July 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

a) ☐ The period for reply expires _____months from the mailing date of the final rejection.

b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.

2. ☐ The proposed amendment(s) will not be entered because:

   (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);

   (b) ☐ they raise the issue of new matter (see Note below);

   (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or

   (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.

4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

5. ☒ The a)☐ affidavit, b)☐ exhibit, or c)☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: *The arguments are not persuasive (see continuation sheet).*

6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.

7. ☒ For purposes of Appeal, the proposed amendment(s) a)☒ will not be entered or b)☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

   The status of the claim(s) is (or will be) as follows:

   Claim(s) allowed: _____.

   Claim(s) objected to: _____.

   Claim(s) rejected: 1-28

   Claim(s) withdrawn from consideration: _____.

8. ☐ The proposed drawing correction filed on _____ is a)☐ approved or b)☐ disapproved by the Examiner.

9. ☐ Note the attached Information Disclosure Statement(s)(PTO-1449) Paper No(s). _____.

10. ☐ Other: _____

DAVID WILEY
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 2100

Applicant's arguments filed July 29, 2003 have been fully considered but they are not persuasive.

In the remarks, Applicant argues in substance that, (1) Rakavy discloses monitoring the percentage of time the line is utilized, (2) Rakavy teaches away from the claimed invention because Rakavy discloses downloading information only when the line utilization is below a threshold, (3) Riggan is non-analogous art with respect to Applicant's invention, (4) there is no suggestion to combine the references of Riggan and Rakavy .

As to point (1), Applicant correctly points out that low line utilization occurs when the communication line is busy no more than a predetermined percentage of time as stated in Rakavy, however the term "monitored level of utilization" as stated in the claimed invention can be broadly construed to be interpreted as a ratio of utilized time versus idle time, which is the method described in Rakavy as to how the low line utilization threshold is calculated. Applicant's claimed invention does not specifically state what the monitored level of utilization is or how it is obtained, that it is merely a function of the monitored level of utilization. Therefore the broadest interpretation as allowed in the art is used in determining the patentability of the invention.

As to point (2) Applicant is again correct in pointing out that Rakavy discloses that the system downloads information only when the line utilization is below a threshold. However this does not teach away from the claimed invention since claim 1 recites the limitation "*if the actual level is less than the threshold level, receiving at least a portion of the set of data over the network*" (claim 1, emphasis added). The claimed invention discloses the test of the actual utilization being less than a calculated threshold which is similar to the test performed in Rakavy. In this sense it is believed that one of ordinary skill in the art would not determine this reference to be teaching away from the claimed invention.

As to point 3, In response to applicant's argument that Riggan is non-analogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the claimed invention is in the field of network bandwidth management by determining if the Quality of Service (QoS) provided to the client will be affected if information is downloaded in the background of the system. QoS embodies many things in a computer network, from line utilization, to computer monitoring and including dropped packets (also called cells). A person of ordinary skill in the art would determine Riggan as analogous art since both the claimed invention and the system described in Riggan are both directed towards improving QoS between a sender and a client. In this way, it is believed that Riggan is analogous art with respect to the claimed invention.

As to point (4) In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves *or in the knowledge generally available to one of ordinary skill in the art*. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, It would be obvious to a person of ordinary skill in the art at the time the invention was made to combine the teaching of Riggan with Rakavy to provide a threshold based on the total bandwidth allotted to the node, which might be greater than the current bandwidth utilized, allowing a greater amount of bandwidth available to be allocated below the threshold.